

IN THE
Supreme Court of the United States

October Term, 1979

No. 78-1883

EXECUTIVE JET AVIATION, INC., Petitioner

v.

HONORABLE PATRICIA A. BOYLE, Judge of the
United States District Court, Eastern District of
Michigan, Southern Division, Respondent,

ESTATE OF DANIEL KEITH GREEN, Deceased,
by Mary Lynn Green, Administratrix, Respondent,
and

ESTATE OF HAROLD RAY CARROLL, Deceased,
by Marlene Carroll, Administratrix, Respondent,
jointly, as real parties in interest.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondents, **ESTATE OF DANIEL KEITH GREEN,** Deceased, by Mary Lynn Green, Administratrix, and **ESTATE OF HAROLD RAY CARROLL,** Deceased, by Marlene Carroll, Administratrix, respectfully pray that the Petition for Writ of Certiorari to Review the Judg-

ment of the United States Court of Appeals for the Sixth Circuit Court be denied.

QUESTIONS PRESENTED

1. Whether issuance of a Writ of Mandamus by the Court of Appeals is the appropriate remedy where a District Court enters a remand order based on erroneous grounds.
2. Whether Summary Judgment, eliminating the sole non-diverse party defendant from the State Court action, can create diversity requisite to federal removal jurisdiction.
3. Whether a proposed order, eliminating the sole non-diverse party defendant from the State Court action, can create removal jurisdiction diversity and satisfy the requirements of 28 U.S.C. §1446 (b) as an "other paper".
4. Whether remand may be based on a "waiver" of the right to remove.

COUNTER STATEMENT OF FACTS

After exhaustive and extensive discovery and Pre-Trial proceedings, respondent Green settled with defendant Gates Learjet, and said Defendant was dismissed in October of 1978. A similar settlement with responder Carroll was reached and Learjet was dismissed accordingly, on November 15, 1978. The following three days consisted primarily of settlement conferences with the remaining Defendants. Thereafter, the action was assigned to the Honorable Irwin Burdick, Wayne County Circuit Court Judge for immediate trial on November 21, 1978. On

November 22, 1978, Judge Burdick began hearing trial motions (Motion in limine) prior to jury selection. No proceedings were held on November 23 and 24 because of the Thanksgiving holiday. On November 27, 1978, defendant Howard Zantop's Motion for Summary Judgment (originally set for November 15, 1978) was heard. Respondent Green and Carroll had not filed opposition to said Motion for Summary Judgment and same as to defendant Zantop was so granted. Upon motion, the captions of the subject cases were amended, removing defendants Gates Learjet and Howard Zantop, respectively. Counsel for Howard Zantop and Gates Learjet did not appear or participate further in the action and no transfer of money from Howard Zantop to respondents has ever been made. Petitioner Executive Jet Aviation, Inc., made no opposition to the Motion for Summary Judgment.

On November 27, 1978, Respondents moved to bar evidence of settlement negotiations with former defendant Gates Learjet. Judge Burdick granted Respondent's motion. At this time, Petitioner sought, and was granted, leave to move before the presiding Judge of the Circuit Court of Wayne County for adjournment of trial for the purpose of filing an appeal of the order in limine. Said motion was denied by the presiding Judge. Thereafter, petitioner Executive Jet Aviation, Inc., secured a certificate from the Court stenographer for purposes of perfecting appeal to the Michigan Appellate Courts.

Beginning on November 28, 1978, after a motion by Petitioner to amend the complaint was granted, evidentiary discussions were ordered by Judge Burdick in anticipation of jury selection. Said discussions and evidentiary hearings were held on the dates of: November 28, 29, 30, 1978;

December 1, 4, 7, 8, 12, 13, 14, 15, 18, 19, 20, 21, and 27, 1978.¹ On December 27, 1978, petitioner Executive Jet Aviation, Inc., removed said cause to the United States District Court for the Eastern District of Michigan, Southern Division. Prior to December 27, 1978, petitioner Executive Jet Aviation, Inc., never requested a suspension of the trial proceedings nor objected to the continuation of the trial proceedings for the purposes of preparing their bond and petition for removal. The cause was remand to the State Court on February 9, 1979.

Trial Proceedings, after remand, were re-initiated before Judge Burdick. On March 22, 1979, the jury returned a verdict in favor of respondents Green and Carroll against petitioner Executive Jet Aviation, Inc. The Judgment was entered on April 20, 1979.

¹Petitioners proceeded to argue the merits of the case with regard to the admissibility of certain deposition testimony. Counsel for the parties made objections to questions in the deposition testimony of witnesses J. O. Johnson, R. C. Adams, Horace Parham, William Boggs, Virgil Gutridge, Robert Klapprott, Richard Breer, Joseph Hine, Larry Patterson, William Tolbert, Ronald Puckett, Robert Berry and Raymond Pahls. Hearings were held before Judge Burdick and the Court ruled on all objections on the depositions of J. O. Johnson, R. C. Adams, Horace Parham, Virgil Gutridge made by each party, and 75% of the deposition of Robert Klapprott. In the deposition of Virgil Gutridge alone, Petitioner objected to and received rulings on approximately two hundred (200) questions. The attorneys for all three parties worked almost continuously on the deposition testimony from November 27, 1978, until petitioner Executive Jet Aviation, Inc., filed its Petition to remove this action to the Federal Court on December 27, 1978 at 2:30 p.m.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I

ISSUANCE OF A WRIT OF MANDAMUS BY THE COURT OF APPEALS MAY BE APPROPRIATE IF REMAND IS BASED ON ERRONEOUS GROUNDS. HOWEVER, REMAND BASED ON AN "IMPROVIDENT" REMOVAL, IS IMMUNE FROM APPELLATE REVIEW.

28 U.S.C. §1447 (c), (d) provides that District Court remand orders, based on an "improvident" removal, are immune from Appellate review. Clearly, the Honorable Judge Patricia M. Boyle, properly exercised her discretion in remanding this cause of action in accordance with 28 U.S.C. §1447 (c). (Pet. App. 23a; 24a) Petitioner Executive Jet Aviation, Inc., was "improvident" in removing, having waived any right to remove by continuing with the trial Court proceedings without objection after the occasion for removal arose. (See Counter Statement of Facts, at 3, 4)

The Sixth Circuit Court of Appeals denied Petitioner's request for a writ of mandamus, affirming Judge Boyles discretion in remanding for the reasons set-forth in her Order of Remand. (Pet. App. 23a, 24a) Further, the Court of Appeals held that the issuance of a writ of mandamus, to circumvent the bar of 28 U.S.C. §1447 (d) to Appellate review of remand orders, was a "drastic remedy . . . [only to] be utilized where the party involved has a *clear* and *undisputed* right to the remedies sought." (Emphasis added) (Pet. App. 29a, 30a) Not only is Petitioner's right to a remedy both unclear and disputed, there exists no wrong in need of remedy.

II

**SUMMARY JUDGMENT, ELIMINATING THE SOLE
NON-DIVERSE PARTY DEFENDANT FROM THE
STATE COURT ACTION, CAN CREATE DIVER-
SITY REQUISITE TO FEDERAL REMOVAL JURIS-
DICTION.**

As the District Court Judge found the extensive discussions and evidentiary argument in which petitioner Executive Jet Aviation, Inc., participated were in the context of trial, immediate steps should have been taken to preserve Petitioner's right to remove.

The granting of the Motion for Summary Judgment was the event that put Petitioner on notice of his right to remove. Clearly, Executive Jet Aviation, Inc., cannot assert that a written order controls when the time for removal begins: In *Stack v. Strang* 191 F. 2d 106 (2d Cir. 1951), the Court held the removal right arises even though the state action would not be a final (or formal) dismissal since leave to amend had been granted. The Defendant in *Stack* had waited beyond the statutory period to remove before making its motion, awaiting the receipt of the Plaintiff's amended complaint. Further, the right of removal is not conditioned upon or dependent on final determination of any of the state proceedings, *Hamilton v. Hayes Freight Lines*, 102 F. Supp. 594 (E.D. Ky. 1952), and is certainly not dependant upon a formal written order dismissing the resident Defendant. *Id.*; *Stack, supra*.

Accordingly, Michigan does not require a writing for an order to have immediate effect. In *Goldstein v. Kern*, 82 Mich. App. 723, 267 N.W. 2d. 165 (1978), the Michigan Court of Appeals held that an oral pronouncement will be given immediate effect if the Judge so states. Further, if the parties have acted in good faith in accordance, and

relied on the Judge's oral statement, the order is final as of the oral pronouncement. *Saunders v. Smith*, 86 Mich. App. 1, 272 N.W. 2d. 174 (1978); *Eisman v. Eisman*, 86 Mich. App. 91, 272 N.W. 2d. 340 (1978).

Clearly, Judge Burdick's grant of Summary Judgment was to be given immediate effect, inasmuch as defendant Howard Zantop never appeared further in the action. Therefore, petitioner Executive Jet Aviation, Inc's., right to remove arose immediately, and since proceedings were in the context of trial, additional proceedings on the merits of the instant action (Motions in limine, ordering of transcript for appeal to the Michigan Appellate Court, the hearing on Petitioner's motion to amend their answer which, if granted, would dismiss Respondent's case, the review of the depositions and the argument of evidentiary matters, Pet. App. 5a, Tr-5) evidenced the Petitioner's willingness to further invoke the jurisdiction of the State tribunal. *Ford v. Roxana Petroleum*, 31 F. 2d 765 (N.D. Tex 1929); *Waldron v. Skelly Oil Corp*, 101 F. Supp. 425 (E.D. Mo. 1951).

**A PROPOSED ORDER, ELIMINATING THE SOLE
NON-DIVERSE PARTY DEFENDANT FROM THE
STATE COURT ACTION, CREATES REMOVAL
JURISDICTION AND SATISFIES THE REQUIRE-
MENTS OF 28 U.S.C. §1446 (b) AS AN "OTHER
PAPER."**

28 U.S.C. §1446 (b) sets the time at which a Petition for Removal is to be filed:

§1446—Procedure for Removal

(b) . . . after receipt by the Defendant, through service or otherwise, of a copy of . . . [an] other

paper from which it may be first ascertained that the case is one which is or has become removable. (Emphasis added.)

Circuit Court Judge Burdick granted Summary Judgment for the sole non-diverse party by oral decree on November 27, 1978. (Pet. App. 7a) On December 4, 1978, Petitioner Executive Jet Aviation, Inc., received notice by a proposed order embodying Judge Burdick's decree of Summary Judgment, that the cause of action had become potentially removable. This proposed order was submitted to Petitioner Executive Jet Aviation, Inc., and the Respondents for approval, and same was so approved by the parties on December 4, 1978.

The question of whether a proposed order satisfies the notice requirement of §1446 (b) was answered by the Court in *Gibson v. Coast Line Railroad Co.*, 299 F. Supp. 269, (S.D.N.Y. 1969).

In *Gibson*, the cause of action met all the requirements for a removable case except that the \$10,000.00 jurisdictional amount had not been pleaded in the original complaint. Plaintiff motioned to amend the complaint, increasing the jurisdictional amount to a sum in excess of \$10,000.00. The Court granted this motion orally in open Court and later, same was reduced to writing in the form of a proposed order. In determining the time at which the period for removal commenced pursuant to 28 U.S.C. §1446 (b), the Court held: "... certainly the service of the proposed order on [date] starts the running of the period [for removal]."

In the case at bar, as in *Gibson*, receipt of the proposed order eliminating the sole non-diverse party was such "other paper" within the purview of 28 U.S.C. §1446 (b). At this time, petitioner Executive Jet Aviation, Inc., had

notice that it must either stay the State Court proceedings and motion for removal or waive its right to same. Petitioner Executive Jet Aviation, Inc., chose the latter, proceeding with extensive litigation at the State Court level.

REMAND IS APPROPRIATE WHERE THE RIGHT TO REMOVE IS WAIVED.

Clearly, the resident Defendant was removed from the action upon oral grant of the Motion for Summary Judgment made by Howard Zantop or presentment of the draft of the written order to Petitioner. At that moment the right to remove, if any did exist, arose. A Defendant entitled to removal, waives that right by conduct demonstrating its willingness to further involve the jurisdiction of the State tribunal. *Ford v. Roxana Petroleum Corp.*, 31 F. 2nd 765 (N.D. Tex. 1929); *Fugard v. Thierry*, 265 F. Supp. 743 (N.D. Ill. 1967).

Being in Trial creates an immediate obligation on the party seeking removal to make some declaration as to their intention to embrace federal jurisdiction. In *Waldron v. Skelly Oil Co.*, 101 F. Supp. 425 (E.D. Mo. 1951) the Plaintiff had initiated his action against three corporate Defendants. As Plaintiff's counsel in *Waldron* began his opening statement, he dismissed the two resident corporations leaving Skelly Oil Co., a foreign corporation, as the sole Defendant. The Defendant waited until the end of the Plaintiff's opening statement before asking the Court for leave to suspend the trial to petition for removal. The District Judge denied the motion and the trial proceeded. The Court ruled that "when the case becomes removable during the process of the trial, the right to remove may

be waived by proceeding with the trial, unless timely objection is made." *Id.* at 426.

The *Waldron* Court in holding that:

... when a cause first becomes removable during the process of a trial that the party must take immediate steps to remove the case if his right is preserved. . .

also cited *Morgan's L. & T. R. & S. S. Co., v. Street*, 47 Tex. Civ. App. 194, 122 S.W. 270 (1909). In *Street*, the Defendant was informed by way of the Court's charges to the jury, that the resident Defendant had been dismissed. The Court held that this was the point at which Defendant's right to remove arose, and by allowing the trial Court proceedings to continue without objection, the Defendant waived its right to remove.

There is an obvious inequity in allowing a Defendant, with a removable action, to proceed at the State Court level, and then, being dissatisfied with the State Court decisions, have the issues readjudicated in the Federal Courts by way of removal. *Rosenthal v. Coates*, 148 U.S. 142 (1893); *In Re 73 Precinct Station House, Borough of Brooklyn*, 329 F. Supp. 1175 (E.D. N.Y. 1971).

Petitioner Executive Jet Aviation, Inc.'s, conduct in embracing the jurisdiction of the State Court goes well beyond mere minor involvement after the right to removal arose; more than a single day to oppose a preliminary injunction as in *Swan v. Community Relations*, 374 F. Supp. 9 (E.D. Wis. 1974); or to prevent an auction of its assets as in *Genie Machine Products, Inc., v. Midwestern Machinery Co.*, 367 F. Supp. 897 (W.D. Mo. 1974); or oppose a preliminary injunction as in *Baker v. National Blvd. Bank of Chicago*, 399 F. Supp. 1021 (N.D. Ill. 1975); or to avoid default when the State Courts provided for a shorter time

to answer than the Federal Courts did to file the removal petition in *Champion Brick Co. v. Signade Corp.*, 37 FRD 2 (D. Md. 1965) and *Morris v. Vitele*, 412 F. 2d 1174 (9th Cir. 1969) Executive Jet Aviation, Inc., instead of merely taking a defensive posture, actively litigated the merits of the case in the State Court without objection, and then when it was not satisfied with the results received from the State Court, sat silently back while harboring a secret desire to have a final adjudication of the merits in Federal Court.

By arguing the admissibility of deposition testimony of six witnesses, Petitioners' conduct surely demonstrated an intent to further invoke the jurisdiction of the State Court and abandon and waive its right of removal to the Federal Courts. By actively participating in State Court proceedings from November 27, 1978, through December 27, 1978, without once raising to the State Court a motion for suspension of the proceedings for time to prepare to apply for removal and to secure the removal bond, Petitioner waived its right of removal. It could not then remove to Federal Court and in so doing receive a rehearing on the evidentiary issues. Petitioner Executive Jet Aviation, Inc., by its own affirmative action, waived its right of removal. Therefore, this case was properly remanded to the Courts of the State of Michigan.

CONCLUSION

For the reasons set-forth above, the Petition for Certiorari should be denied.

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